

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 March 2004

CASE NO.: 2003-BLA-190

In the Matter of:

DENNIS W. WHALEN
Claimant

v.

PITTSBURG & MIDWAY COAL MINING
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Patrick K. Nakamura, Esq.
For the Claimant

John W. Hargrove, Esq.
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Birmingham, AL on January 13, 2004 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-26, claimant's exhibit (CX) 1, and employer's exhibits (EX) 1-3 were admitted into evidence. Both parties filed timely briefs.

ISSUES

- I. Existence of pneumoconiosis
- II. Causal relationship of pneumoconiosis and coal mine employment.
- II. Existence of total disability.
- IV. Causation of total disability.
- V. Material change in conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

Procedural History

Dennis W. Whalen (claimant or miner) filed his first claim for benefits on January 25, 1990. The claim was denied by the district director on November 30, 1990. (DX 1) Claimant filed a second claim on February 24, 1999 which was denied by the district director on October 26, 1999 because the evidence did not establish any of the elements of entitlement. (DX 2) Claimant filed the instant claim on March 25, 2002. (DX 3) The district director denied the claim on February 3, 2003, and the case was referred to the office of Administrative Law Judges on May 20, 2003. (DX 22, DX 26)

Background

The miner was born on October 19, 1920 and has no dependents. (DX 3) His employment records indicate that he was employed as a coal miner for a total of forty years and four months between October 1939 and January 2, 1986. See DX 1, DX 2. All of his coal mine work was in underground mines with significant exposure to coal dust. See TR 10-23. From 1973 until his retirement in 1986, claimant was a safety supervisor checking for safety and health compliance in the mine. (TR 15, 22) He walked at least eight to ten miles a day in this job. (TR 27) Claimant experiences shortness of breath with exertion. (TR 25) He testified that he smoked cigarettes for a total of five years and that he has not smoked for twenty five to thirty years. (TR 28-29)

¹ The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

Medical Evidence

Only the medical evidence from the current claim is summarized herein.

Chest x-rays

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>Interpretation</u>
DX 9	4/30/02	Nath, BCR, B	negative for pneumoconiosis
DX 9	4/30/02	Sargent, BCR, B	quality 2
DX 11	4/30/02	Branscomb	negative for pneumoconiosis
DX 10	7/16/02	Ballard, B	1/0, s/t
CX 1	9/11/02	Loflin, B	0/1, q/s
DX 11	11/1/02	Goldstein, B	negative for pneumoconiosis
DX 11	11/1/02	Branscomb	negative for pneumoconiosis

Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>
DX 9	4/30/02	68 in.	81	1.36	2.27	41
				1.54*	2.59*	60*
DX 9	6/27/02	68 in.	81	1.34	2.49	57
				1.58*	2.82*	66*
DX 10	7/30/02	69 in.	81	1.43	2.69	35
DX 11	11/1/02	69 in.	82	1.28	2.30	57
				1.50*	2.60*	59*

*post bronchodilator

Dr. J. Michos found that there was a suboptimal MVV performance on the April 30, 2002 studies that the June 27, 2002 studies are acceptable. (DX 9)

Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 9	4/30/02	43.4	83
		43.9*	90.5*
DX 10	7/30/02	40	88
		42*	90*
DX 11	11/1/02	42	89

*exercise values

Medical Reports

The treatment records of Dr. Walter R. Ross, Jr. are at CX 1. See also EX 1. The notes reflect Dr. Ross' treatment of claimant on May 25, 1999, November 7 and November 9, 2000,

February 8 and March 29, 2001, September 9, 2002, and March 3 and August 1, 2003. Dr. Ross noted that claimant has a long and extensive smoking history. He diagnosed COPD, asbestosis, and coal workers' pneumoconiosis, stating on March 29, 2001 that his diagnosis of pneumoconiosis was based on the miner's history, physical examination, chest x-ray, and pulmonary function studies.

Dr. Abdur Shad examined the miner on April 30, 2001. (DX 9) Dr. Shad recorded that claimant had smoked cigarettes from 1940 to 1985. The physical examination was normal, the chest x-ray was negative for pneumoconiosis, the pulmonary function studies showed severe obstructive lung disease, and the blood gas studies were normal. Dr. Shad diagnosed COPD due to coal dust inhalation and smoking. He stated that the miner has severe obstructive lung disease and can not perform his last coal mine job.

The handwritten medical records of Dr. Jeffrey Hawkins are at DX 10. Dr. Hawkins stated that claimant is a non-smoker with a remote smoking history. His diagnosis was COPD and ?CWP.

Dr. Allan R. Goldstein examined claimant on November 1, 2002. (DX 11) He noted that claimant had smoked a half pack of cigarettes a day for thirty years but had not smoked for twenty five years. In the physical examination, there were decreased breath sounds without rhonchi, wheezes, or rales. The chest x-ray showed blunting of the left costophrenic angle but no nodules consistent with coal workers' pneumoconiosis. The pulmonary function studies demonstrated a moderate obstructive defect with slight improvement following bronchodilators. The blood gas test was normal. Dr. Goldstein diagnosed COPD with mild reversibility and blunting left costophrenic angle, unclear etiology.

A review of claimant's medical records was performed by Dr. Ben Branscomb. (DX 11) In a November 26, 2002 report, Dr. Branscomb concluded that the pattern of obstructive airways disease seen in claimant is typical of a person with cigarette induced COPD. He opined that the miner's coal dust exposure did not cause, aggravate, or accelerate his COPD and/or pulmonary impairment.

Dr. Branscomb testified at the hearing that claimant's pulmonary problems are due to cigarette smoking. (TR 39) He stated that the pulmonary function studies show moderately severe COPD with emphysema. (TR 43) Such a pattern is not consistent with coal workers' pneumoconiosis which produces obstructive lung disease only in its far advanced stages. (TR 43) Dr. Branscomb acknowledged that claimant does not have the pulmonary function to perform his last coal mine job as a safety inspector. (TR 44) But he reiterated that claimant's pulmonary disability is due to COPD from smoking not coal mine dust exposure. (TR 44-45) Dr. Branscomb further asserted that as there is no indication that the miner had COPD when he was employed as a coal miner, his COPD could not have arisen from his coal mine employment. (TR 49-50) He agreed, however, that claimant's medical records show that he had COPD at least as far back as 1990. (TR 51).

Conclusions of Law

Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986).

The present claim was filed more than one year after the denial of claimant's most recent claim and it is therefore considered a subsequent claim. A subsequent claim may be approved only if the new evidence establishes at least one of the elements of entitlement previously adjudicated against the miner. § 725.309(d). The miner's 1999 claim was denied because the evidence failed to establish any of the elements of entitlement.

The evidence from the current claim clearly establishes the miner's total disability. See § 718.204(b)(1). Although the blood gas studies are nonqualifying and there is no evidence of cor pulmonale, all seven pulmonary function studies, four pre-bronchodilator and three post-bronchodilator, have produced qualifying values. Dr. Ross, Dr. Hawkins and Dr. Goldstein did not assess the degree of claimant's pulmonary disability, but Dr. Shad and Dr. Branscomb concluded that claimant lacks the pulmonary capacity to perform his last job as a safety inspector. See § 718.204(b)(2). As this new evidence demonstrates that the miner is totally disabled, I will consider all the evidence of record to determine if he is entitled to benefits. See *Allen v. Mead Corp.*, 22 BLR 1-61 (2000).²

A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.³ § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F. 3d 22 (3d Cir.1997), *Island Creek Coal Co. v. Compton*, 211 F 3d 203 (4th Cir., 2000).

A preponderance of the x-ray evidence is negative for pneumoconiosis. The only positive x-ray reading from the current claim is Dr. Ballard's reading of the July 6, 2002 x-ray. The April 30, 2002 x-ray was interpreted as negative for pneumoconiosis by Dr. Nath, a board certified radiologist and B reader, and by Dr. Branscomb. The September 11, 2002 x-ray was read as 0/1 by Dr. Loflin, a B reader, and the November 1, 2002 x-ray was read as negative by Dr. Goldstein, a B reader, and by Dr. Branscomb. Five of the six chest x-ray interpretations from the prior claims are negative for pneumoconiosis.

There is no biopsy evidence and claimant is not eligible for the enumerated presumptions.

² Any evidence from the miner's prior claims that does not establish total disability is accorded less weight than the evidence from the current claim as the more recent evidence accurately reflects claimant's current pulmonary condition.

³ Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or clinical, pneumoconiosis and statutory, or legal pneumoconiosis.

Dr. Hawkins and Dr. Goldstein did not make a definite diagnosis of coal workers' pneumoconiosis. Dr. Ross and Dr. Shad determined that claimant has chronic obstructive pulmonary disease arising out of coal mine employment which meets the definition of legal pneumoconiosis in § 718.201. Their opinions are based on the miner's history, a physical examination, a chest x-ray, and pulmonary function studies and are therefore reasoned medical opinions. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Dr. Branscomb attributed claimant's chronic obstructive pulmonary disease solely to cigarette smoking but his opinion has two fatal flaws. First, he stated that obstructive pulmonary disease is only present when pneumoconiosis is in a far advanced stage. The regulations specifically state that legal pneumoconiosis includes obstructive pulmonary disease arising out of coal mine employment and do not limit the definition to only severe cases of pneumoconiosis as Dr. Branscomb suggested. See § 718.201(a)(2). Second, Dr. Branscomb asserted that the miner's chronic obstructive pulmonary disease could not have been caused by his exposure to coal dust because it was not present when he retired from coal mining. However, the evidence indicates that the miner was diagnosed with chronic obstructive pulmonary disease in 1990, only four years after his retirement, and may well have suffered from this disease while he was still employed in the mines. Dr. Branscomb's opinion is therefore based on an incorrect factual premise. As his opinion is contrary to the regulatory definition of pneumoconiosis and relies on a factual assumption that is not substantiated by the evidence, it can not be credited. I credit the well reasoned opinions of Dr. Ross and Dr. Shad that the miner has legal pneumoconiosis.

As the miner had over forty years of coal mine employment, he is entitled to the presumption in § 718.203(b) that his pneumoconiosis arose out of coal mine employment. This presumption has not been rebutted by the evidence of record.

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's total disability if it: (i) Has a material adverse effect on his respiratory or pulmonary impairment; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1).

Dr. Shad concluded that claimant's pulmonary disability is a result of coal dust exposure and cigarette smoking. Drs. Ross, Hawkins, and Goldstein did not offer an opinion on the causation of the miner's pulmonary impairment. Dr. Branscomb stated that the miner's pulmonary disability is due solely to cigarette smoking but his opinion on causation has been discredited. Moreover, as Dr. Branscomb did not diagnose pneumoconiosis his opinion on causation is entitled to little weight. See *Scott v. Mason Coal Co.*, 289 F. 3d 263 (4th Cir. 2002). The evidence on the miner's cigarette smoking history is contradictory. He testified that he smoked cigarettes for a total of five years and that he had not smoked for twenty five to thirty years. Dr. Ross found that he had a long and extensive smoking history, Dr. Hawkins found that he had a remote smoking history, Dr. Shad determined that claimant had smoked cigarettes from 1940 to 1985, and Dr. Goldstein stated that claimant had smoked one half pack of cigarettes a day for thirty years quitting twenty five years ago. In the prior claim Dr. Ferris had recorded a smoking history of one half pack a day from 1942 to 1984. In light of the much heavier smoking histories recorded by the examining physicians, I do not credit claimant's testimony that he only

smoked cigarettes for five years, but the evidence is clear that claimant has not smoked cigarettes for many years. Although claimant had a long cigarette smoking history, the evidence shows that his pneumoconiosis had a material adverse effect on his pulmonary impairment or at least materially worsened his pulmonary impairment caused by cigarette smoking.

The evidence establishes that the miner is totally disabled due to pneumoconiosis. Because the onset date of his total disability due to pneumoconiosis is not clear, benefits will be awarded as of March 1, 2002, the first day of the month in which the present claim was filed. See § 725.503(b). Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. The employer has twenty days to respond with objections.

ORDER

IT IS ORDERED THAT Pittsburg & Midway Coal Mining pay to claimant all the compensation and medical benefits to which he is entitled beginning as of March 1, 2002 .

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the office of the district director, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210